89-1120

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JOSEPH F. SPANIOL, JR.
CLERK

Case No. _____

Supreme Court Of The United States

October 1989 Term

Elenor M. Catalina,

Petitioner

vs.

City of Columbus, Ohio
Tom Moody, Mayor
Hugh Dorrian, Auditor
David Ort, Treasurer
The Columbus Municipal Civil Service Commission
Thelma Schoonover, Chairperson
John C. Young, Member
Earl Murray, Member

Respondents

PETITION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Where a jury specially finds discriminatory, deliberate discharge of a 64 year old, 22 years service, white, civil service employee for, "A NEED TO HIRE MORE BLACKS AND WOMEN FOR A BALANCE TO MEET LAWS", but renders a general verdict for the city on the issues of discrimination on the basis of age and race, and the district court grants judgment for the city, does the Court of Appeals, by upholding such action, depart so far from the accepted course of judicial proceedings as to call for this court's power of supervision to enter judgment for Plaintiff, or to grant a new trial?

2. Has the United States Court of Appeals for the Sixth Circuit, by upholding such action, acted in conflict with the law recognized by other federal courts

of appeal and The United States Supreme Court so as to require corrective action by this Court?

3. In an action tried by a jury, for age discriminations under 29 U.S.C. 621-634 and for reverse race discrimination under 42 U.S.C. 1981, which is tried along with Plaintiff's claims of race, sex and retaliation discrimination under 42 U.S.C. 2000 (e), with advisory interrogatories, may the court disregard the specific written jury findings of reverse race discrimination and substitute its judgment of the facts in rendering judgment under 42 U.S.C. 2000 (e)?

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GROUNDS FOR JURISDICTION

The United States Constitution, Article III, Section 1, vests judicial power in one supreme court, which, under Section 2, shall extend to all cases under the laws of the United States. Plaintiff asserts violation of employment rights under the Age Discriminations in Employment Act, 29 U.S.C. Sec. 621-634; Title VII, 42 U.S.C. Sec. 2000 (e) and under the Civil Rights Act of 1866, 42 U.S.C. Sec. 1981. Review of CCA 6th action is available under 28 U.S.C. Sec. 2101 (c) by Petition for Certiorari. The Seventh Amendment guarantees a fair trial, which was subverted in this case by failure of the trial and appellate court to recognize jury findings of discharge to meet affirmative action goals.

STATEMENT OF THE CASE

Plaintiff, Elenor M. Catalina, at age 64, was discharged from her 22 years of classified civil service employment as a Personnel Analyst of The Columbus Municipal Civil Service Commission. After exhausting administrative remedies, she filed a complaint in the United States District Court, Southern District of Ohio, asserting age discrimination under 29 U.S.C. Sec. 621-634, reverse race discrimination under 42 U.S.C. 1981, sex, race and retaliation discrimination under 42 U.S.C. 2000 (e), due process and equal protection violations under the Fourteenth Amendment and 42 U.S.C. 1983 and Revenue Sharing Act violations.

The District Court, on motion of the City, applied a one year statute of lim-

itations retroactively to the 42 U.S.C. 1983 claims. Upon the representation of the City that it was not receiving revenue sharing money at the time of the trial, no evidence of discriminatory use of federal funds at the time of discharge was introduced by plaintiff.

The claims of reverse race discrimination in promotion and discharge and of age discrimination, were tried to a jury, which also heard the evidence as to sex discrimination. The court devised a form for the jury to sign which required answers to special interrogatories as to whether the jury found employment discrimination on the basis of race, sex or age, and if so, whether it was done knowingly, intentionally and deliberately.

In the same document the jury was

instructed to render a general verdict on the issues of age and race discrimination.

The jury was asked to answer the following Interrogatory 4:

> "Do you find by a preponderance of the evidence that the racial discrimination practiced was done knowingly, intentionally and deliberately?"

The court, on receiving responses to all interrogatories, stated (Trial Transcript page 24, JOINT APPENDIX page 24):

> "Everything is no and for defendant except the answer to Question 4, 'Do you find by a preponderance of the evidence that the racial discrimination practised was knowingly, intentionally and deliberately?' Signed yes with a note: A need to hire more blacks and women for a balance to meet laws--which I am going to interpret as consistent

with a finding for the defendant on the issue of race discrimination. Would you have a different view on that? You may look at the form Mr. Holmes?"

The court thereafter returned the case to the jury under Rule 49(b) for further consideration "...and to give an explanation that that answer is not consistent (sic) with the other questions on the subject and/or with the general verdict which was for the defendant on the issue of race discrimination." The court, without objection, gave the jury written instructions as follows (Trial Transcript page 24, JOINT APPENDIX pages 24-25):

"As the answer to Question 4 does not follow the answers 2 and 3 and answer 4 is inconsistent with the general verdict for the defendant on the issue of race discrimination, you shall return and deliberate with the intention to remove these inconsist-

> encies; the racial discrimination must relate to the plaintiff, Mrs. Catalina."

The jury retired again but quickly returned. The court announced that the jury had changed the answer to Question 4 from "yes" to "no", but did not announce that the jury had not altered its findings, written out beside answer "4", that the action of the city was for, "A need to hire more blacks and women for a balance to meet laws." (Transcript pages 30-31, JOINT APPENDIX pages 154-155).

The court then found for the city on the Title VII sex discrimination claim and discharged the jury without reviewing the jury writings with counsel as had been done earlier.

Only after the jury had been dis-

charged did the court permit plaintiff's counsel to be heard. Plaintiff's counsel immediately moved for judgment for plaintiff, or for mistrial, based on the clear intentions of the jury, written in by them, to further the affirmative action program even at the expense of deliberate discharge of Mrs. Catalina. (Transcript pages 33-35, JOINT APPENDIX 157-159).

On appeal the Sixth Circuit found that:

> "...the initial inconsistency between the general verdict and the responses to the special interrogatories was cured by the district court, and further finds that Catalina waived her objection to any perceived inconsistency by failing to enter any objection to the special verdict form returned by the jury before the jury was discharged. Catalina's failure to make such an objection in a timely fashion deprived

> the trial court of the opportunity to correct discrepancies, if any existed, in the form of the verdict returned by the jury.."

However, the JOINT APPENDIX submitted to the Sixth Circuit Court, showed that the trial judge had not disclosed that the jury, after further instructions, had not stricken its written, "justification" for discharge, that there was, "A need to hire more blacks and women for a balance to meet laws."

On appeal to the Sixth Circuit, plaintiff argued that the initial finding of discharge to achieve racial goals entitled plaintiff to judgment; that the finding was binding on the court as to Title VII claims and that the court erred in handling the jury special findings of discharge, "to meet laws."

REASONS FOR ALLOWANCE OF WRIT

CONFLICT WITH OTHER COURTS OF APPEAL

Procedural

The Seventh Circuit held, in Elliot vs. Watkins Trucking Co., 406 F. 2d 90 CCA 7th (1969), that the answer to a special interrogatory, by which the jury found contributory negligence, controlled and precluded a general verdict for plaintiff. Under this principle a special jury finding, written in, of discharge to meet a need to hire blacks and women to meet laws, was a specific finding of discrimination that should have required entry of judgment for plaintiff as to liability.

The Fifth Circuit, in the case of Phillips Chemical Company vs. Hulbert, 301 F. 2d 747 (CCA 5)(1962), held that where a jury found no malice, in a

special interrogatory, but gave a general verdict as if it had found malice, the original special finding controlled. The issue of malice could not be sent back to the jury. Defendant was entitled to judgment. The court said:

> "However, having thereafter been informed by the court that this special answer could not stand with its hard wrought general verdict, no imagination was required to predict that the jury would likely change its answer to the interrogatory rather than see its general verdict fall."

In Mrs. Catalina's case the jury specially found discrimination against Mrs. Catalina, "to-meet laws," both when the issue was first considered, and even after reconsidering what the judge characterized as an "inconsistent" special finding. The jury left in its written

finding, "to meet laws," language when returning its verdict a second time.

In Aquachem Co. Inc. vs. Olin, 699 F. 2d 516 (CCA 11)(1983), the initial response of a jury to a special finding controlled. The court rejected the argument that a mere clerical error had occurred and did not send the case back to the jury as did the trial judge in Mrs. Catalina's case, after hearing a "clerical error" argument from the city.

The Sixth Circuit is at variance with other circuits on the procedural question of the force to be given a special finding which is clearly inconsistent with a general verdict.

The Sixth Circuit is also in conflict with the Second Circuit, which recognized, in Schaafsma vs. Morin Vermont Corp., 802 F. 2d 629, 634 (CCA 2)

(1986), that even if trial counsel has not objected, where the jury clearly misapprehends the law (in that case the difference in damages for rescission as contrasted to damages for fraud), the court has an independent duty to prevent a miscarriage of justice.

In Mrs. Catalina's case the trial court well knew that the jury found race discrimination in discharge against Mrs. Catalina. The trial judge also knew that the jury thought that such race discrimination was required, "to meet laws," and continued to think that way even after the trial judge told them to make matters "consistent."

This is not a "plain error" or "waiver," case, because plaintiff's counsel was not allowed to see the verdict form, before discharge of the jury, when

it was returned a second time with the words, "..to meet laws," still on it. But the principle involved in the "plain error," concept applies; namely that the court should not permit the jury to misapprehend the law.

In Edwards vs. Mayes, 385 F. 2d 369, 373 (CCA 4)(1967), the 4th circuit invoked "plain error," where instructions plainly misstated controlling principles. But the Catalina case is worse. The erroneous controlling principle was twice clearly stated by the jury with the court's approval, namely the mistaken belief that, legally, a senior employee could be discharged "to meet laws." The judge fostered that, "plain error," by not disclosing the repeated jury language to plaintiff's counsel before he discharged the jury.

Wholly aside from the "waiver," claim, or review of the way the trial judge handled the "to meet laws," language, it is clear that other circuits grant a new trial where the application of substantive law is unclear. In Saunders vs. State of Rhode Island, 731 F. 2d 81 (CCA 1)(1984), where the substantive law as to the care of inmates was not clear at time of trial, and was only clarified after the jury had been discharged, the court held that the failure to give complete and adequate jury instructions required a new trial under Rule 49(b).

The Fourth Circuit reversed where there was a clearly erroneous instruction of law, that recovery was possible on a counterclaim only if the plaintiff could not prevail in its claims in Miller vs.

Premier Corp., 608 F. 2d 973 (CCA 4) (1979).

The First Circuit case of Boston Chapter NAACP et al vs. Beecher et al, 716 F. 2d 931 (CCA 1) (1983), illustrates that in that circuit, at least, the disastrous effects of financial damage to senior white employees, who are discharged to meet affirmative action goals, is a matter of such great public concern that the State of Massachusetts passed a law reinstating senior policemen and firemen who had been discharged. It was only because of that law that the First Circuit could find racial discrimination issues moot but, the Sixth Circuit would ignore the loss of Mrs. Catalina's job and retirement benefits.

SUBSTANTIVE LAW CONFLICTS

The trial judge stated that a gene-

ral verdict for the city, coupled with a finding of deliberate discrimination in discharge, "to meet laws," was in his view a legal jury finding for the city on the issue of discrimination. He upheld an altered jury verdict form which retained a finding that discharge was "to meet laws." In this the trial judge and reviewing court are in conflict with McDonald et al vs. Santa Fe Trail Transportation Co. , 427 U.S. 273, (CCA 5) (1976), which held that white persons as well as black persons were protected against racial discrimination in employment under both Title VII and 42 U.S.C. 1981.

The trial judge and the Sixth Circuit are also in conflict with the Second Circuit case of Bridgeport Guardians, Inc. Inc. vs. Bridgeport Civil Service

Commission, 482 F. 2d 1333 (CCA 2)(1973), which held that while entry level policemens' jobs could be subject to a quota favoring non-whites, validated promotional exams, where seniority had been achieved by Whites, could not be subject to quotas favoring Blacks.

SUPREMACY OF SUPREME COURT

In the case of Firefighters Local Union No. 1784 vs. Stotts, 467 U.S.C. 561 (1984), on certiorari from the Sixth Circuit it was necessary for this court to reverse the 6th Circuit court approval of a City of Memphis affirmative action plan which would have violated the seniority rights of white firefighters, in a layoff situation. So, the principle of not discharging senior white employees to advance affirmative action plans for blacks was well known to the Sixth Circuit; but

enforcement of the principle was sought to be evaded by both the trial court and the Sixth Circuit by not reporting that the jury retained the written finding of discharge "..to meet laws," on reconsideration.

In Wygant et al vs. Jackson Board of Education et al, 476 U.S.C. 267 (CCA 6) (1986), it was necessary for this court to grant certiorari to reverse a Sixth Circuit judgment which would have permitted senior white teachers in Jackson, Michigan to be laid off in order to achieve affirmative action goals.

The trial judge and the 6th Circuit have acted clearly at variance with Baccia vs. Board of Education, 451 Fed. Suppl. 882 (1978), where the individual was protected from discharge done incident to achieving affirmative action

goals.

The trial judge and the 6th Circuit have acted contrary to the principle set out in United Steelworkers of America AFL-CIO vs. Weber et al, 443 U.S. 193, 61 L. Ed. 2d 480 (1969), where the court said:

> "At the same time the plan does not unnecessarily trammel the interests of white employees. The plan does not require the discharge of white workers and then replacement with new black hires."
> (underlining supplied)

The trial judge and 6th Circuit have acted contrary to the principles carefully carved out by this court in University of California Regents vs. Baake, 438 U.S.C. 265 (1978), where, at page 299 this court said:

> "Third, there is a measure of inequity in forcing innocent

> persons in respondent's position to bear the burdens of redressing grievances not of their making."

Mrs. Catalina, who worked as a Personnel Analyst for the Columbus Municipal Civil Service Commission, a senior person with 22 years of civil service, is precisely the kind of person that other federal circuit courts of appeal have found to be entitled to protection against reverse discrimination. Though the other circuits decisions involve senior union members, the principle is the same, and just as vital for Mrs. Catalina and millions of other individual public employees who entered public service upon the promise that by good and efficient service, usually for 30 years, they could build up security for their later years of work and thereafter for

their retirement.

The Greek philosopher Solon said that a society is good only if it treats its least powerful member the same as its most powerful citizens. Baake and Weber demanded respect for individual rights. The other circuit courts have respected individual rights. This circuit, faced with two jury writings saying that affirmative action goals shall prevail over individual rights, has not protected the individual. This is particularly bad in Mrs. Catalina's case. As a senior Personnel Analyst of the civil service system itself, her premature discharge sent a clear signal that civil service tenure provides no protection against pressures from groups, Black, White, Hispanic, Asian, foreign nationals, or members of religious groups who would

take the senior civil service person's job, without serving the apprenticeship and without compensating the discharged employee for monumental loss of future earnings and retirement benefits.

It may be attractive to cities to promise jobs to various groups. It may be a good thought for appellate courts to uphold lower courts if possible, but it is not a principle recognized by the United States Supreme Court that individual rights of senior employees can be brushed aside to advance affirmative action goals, as was knowingly condoned and facilitated in this case.

This case also involves the question, not yet settled by this Court, as to whether a jury finding of deliberate racial discrimination, "to meet laws" is binding on the federal judge

in deciding Title VII rights, which include protection against racial discrimination, though sex discrimination was not found by the jury. In Williamson vs. Handy Button Machine Company, 817 Fed. 2 1290 (CCA 7)(1987), it was held that jury findings were binding on the trial judge where Sec. 1981 and Title VII issues were tried together.

A P P E N D I X

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

ELENOR M. CATALINA,
Plaintiff,

-v- Case No. C2-80-628

CITY OF COLUMBUS,
Defendant.

GENERAL VERDICT

We the jury find for the *DEFENDANT on the issue of race discrimination.

We the jury find for the *DEFENDANT on the issue of age discrimination.

* Please write in either plaintiff or defendant (Regardless of your answers to the above questions, please answer the following questions)

JURY INTERROGATORY

1. Do you find by a preponderance of the evidence that the plaintiff's race was a motivating factor in the defendant's decision to discharge the

plaintiff?

Yes _____ No __X__

2. Do you find by a preponderance of the evidence that the plaintiff's race was a motivating factor in defendants' decision to not promote the plaintiff.

Yes _____ No __X__

3. Do you find by a preponderance of the evidence that the racial discrimination in defendants' decision to promote the plaintiff occurred after 1976?

Yes _____ No __X__

4. Do you find by a preponderance of the evidence that the racial discrimination practiced was done knowingly, intentionally and deliberately?

Yes __X*__ No __X*__

*A notation was handwritten beside these answers, "A need to hire more blacks & women for a balance to meet laws."

APPENDIX II

5. Do you find by a preponderance of the evidence that the plaintiff's age was a determining factor in the decision to discharge plaintiff?

Yes _____ No __X__

6. Do you find by a preponderance of the evidence that the age discrimination practiced in regard to Elenor Catalina's discharge was done knowingly, intentionally, and deliberately?

Yes _____ No __X__

7. Do you find by a preponderance of the evidence that plaintiff's sex was a motivating factor in the defendants' decision to discharge the plaintiff.

Yes _____ No __X__

8. Do you find by a preponderance of the evidence that plaintiff's sex was a motivating factor in defendants' deci-

sion to not promote the plaintiff.

Yes _____ No X

9. Do you find by a preponderance of the evidence that the sexual discrimination in the defendants' decision to promote or discharge the plaintiff occurred after 1972.

Yes _____ No X

10. Do you find by a preponderance of the evidence that the sex discrimination practiced was done knowingly, intentionally and deliberately.

Yes _____ No X

(signed) Foreperson

(signed)

(signed)

(signed)

(signed)

(signed)

Date: Oct. 25, 1988

APPENDIX IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

ELENOR M. CATALINA

V.

THE CITY OF COLUMBUS, ET AL.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-2-80-628
Judge Smith

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing and that the action be dismissed on the merits.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant recover of the plaintiff his costs of action.

October 26, 1988
Date

KENNETH J. MURPHY
Clerk

(signed)
(by) Deputy Clerk
Adriann M. Stuart

APPENDIX V

TITLE VII JUDGMENT RENDERED FROM BENCH

Trial Transcript, page 31

Joint Appendix, page 155

Interrogatory 4, the answer is no.*

Interrogatory 5, the answer is no.

Interrogatory 6, the answer is no.

Interrogatory 7, the answer is no.

Interrogatory 8, the answer is no.

Interrogatory 9, the answer is no.

Interrogatory 10, the answer is no.

Signed by the six jurors.

Ladies and gentlemen, are these your signatures on the verdict form?

ENTIRE JURY PANEL: Yes, your Honor.

THE COURT: Do you wish me to poll the jury, Mr. Holmes?

MR. HOLMES: I don't believe so, your Honor.

THE COURT: Thank you very much. The Court, based on the direction and advis-

ory decision by the jury on Questions 7, 8, 9 and 10 regarding sex discrimination, finds for the defendant on the Title VII claim.

If the defendant City of Columbus Civil Service Commission will present proposed findings of fact and conclusions of law to the Court on that issue, that will be forthcoming. We would like to have that in the next two weeks, if that is possible, unless other arrangements are made.

Mr. Holmes, if you wish to reply to that in any way, you have every right to.

MR. HOLMES: Yes, sir.

* ("Yes" was changed to "No". The trial court did not report that the jury did not cross out, "A need to hire more blacks and women for a balance to meet laws," see Appendix II.)

APPENDIX VII

No. 88-4187/4089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELENOR M. CATALINA, Plaintiff-Appellant,	) ON APPEAL) FROM THE) UNITED STATES
v.	) COURT FOR THE) SOUTHERN
CITY OF COLUMBUS, Defendant-Appellee.	) DISTRICT OF) OHIO

Decided and Filed Oct. 17, 1989

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges and HARVEY, District Judge*

PER CURIAM. Plaintiff-appellant, Elenor M. Catalina (Catalina), has appealed from the entry of judgment against her pursuant to a jury verdict finding that defendant-appellee City of Columbus, Ohio (Columbus) had not discharged her from Columbus's civil service in violation of the Civil Rights Act of 1861**, 42 U.S.C.

*Hon. James Harvey, Senior District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

**In error on original document should read 1866.

Sec. 1981, Title VII, 42 U.S.C. Sec. 2000(e), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. Secs. 621-634.

On appeal, Catalina has argued that the jury's general verdict was inconsistent with one of its answers to a series of special interrogatories and that, therefore, the case should be remanded for a new trial. This court finds that the initial inconsistency between the general verdict and the responses to the special interrogatories was cured by the district court, and further finds that Catalina waived her objection to any perceived inconsistency by failing to enter an objection to the special verdict form returned by the jury before the jury was

discharged. Catalina's failure to make such an objection in a timely fashion deprived the trial court of the opportunity to correct discrepancies, if any existed, in the form of the verdict returned by the jury.

For the foregoing reasons, the district court's entry of judgment in favor of Columbus in accordance with the jury's general verdict is hereby AFFIRMED.

ISSUED AS MANDATE: November 8, 1989

APPENDIX X

STATUTES

42 U.S.C. 1981

Sec. 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 2000e-2

Sec. 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer---

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because such individual's race, color, religion, sex or national origin.

29 U.S.C. 623

Sec. 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer---

(1) to fail to refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

CERTIFICATE OF SERVICE

This will certify that three copies of the foregoing Petition For Writ of Certiorari was delivered to the office of Ronald J. O'Brien, Columbus City Attorney, attorney for respondents and their successors in office, on January 10, 1990.

Robert D. Holmes
Attorney for Petitioner